In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 159

COOPER-JARRETT, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court which dismissed appellants' complaint seeking to enjoin and set aside an order of the Interstate Commerce Commission. Appellants are four common carriers by motor vehicle and four motor carrier associations. The order of the Commission which appellants seek to enjoin dismissed their complaint charging that the so-called Plan III and Plan IV trailer-on-flatcar (TOFC or

"piggyback") rates and charges of certain railroads were unlawful under the Interstate Commerce Act. *Eastern Central Motor Carriers Assn.* v. *Baltimore & O. R. Co., et al.*, 314 I.C.C. 5. The complaint also attacked the use of Plans III and IV rates by certain freight forwarders.[1]

TOFC rates and charges are not particularly new, and the current Plans III and IV have their roots in plans more than 30 years old.[2] The five plans presently offered were accurately described below (J.S. 3a–4a), and the facts are not in dispute.

Under Plan I, the applicable rates and charges are set by motor carrier tariffs in which the railroads concur. The rail carriers offer only a partial service, substituting rail for motor carrier service upon request by a motor carrier. Under this plan the railroads only transport the loaded truck trailers between rail terminals. They perform no pickup or delivery of the shipments, nor do they load or unload the flatcar.

Under Plan II, the railroad offers its service directly to the shipping public. In addition to providing the line-haul transportation, the railroad provides both the pickup and delivery service, performs load-

[1] Appellants' complaint was one of ten proceedings before the Commission which were made the subject of a single report and order. Some of the proceedings arose from motor carrier complaints, while the remainder arose from Commission investigations (J.S. 21a–24a).

[2] *In the Matter of Container Service*, 182 I.C.C. 653 (1932); *Vehicle Container Rates in Southwest*, 196 I.C.C. 127 (1933); and *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 495 (1936).

ing and unloading, and furnishes the shipper with a truck trailer.

Under Plan III, the railroad transports a trailer supplied by the shipper and offers two of the related four services (*i.e.*, loading and unloading, but not pickup and delivery). Plan III resembles Plan II, and differs from Plan I, in that the railroad deals with the shipper directly, rather than through the motor carrier, and therefore competes, rather than collaborates, with the motor carrier.

Plan IV is identical to Plan III, except that the shipper here provides the flatcar, as well as the trailer, and is responsible for loading and unloading, as well as for pickup and delivery.

Finally, Plan V contemplates joint motor-rail service at joint motor-rail rates, both modes performing line-haul movements.

Appellants' attack is limited to Plans III and IV. First, they contend that the rail carriers cannot offer this "partial service," since they are obligated by the specific provisions of Part I of the Interstate Commerce Act to provide all facilities and services necessary to move goods from the consignor's door to the door of the consignee, and shippers may furnish no part of such facilities and services. Second, they argue that the rail carriers cannot offer Plans III and IV as separate plans, but only in the form of Plan II together with special allowances (published pursuant to Section 15(13) of the Interstate Commerce Act, 49 U.S.C. 15(13)) for those Plan II services performed by shippers. Third, they urge that Plans III and IV are inherently discriminatory,

in that they invite "preference, prejudice and rebating" (J.S. 10).[3]

After a full administrative hearing, in which a number of shippers intervened in support of the challenged plans (J.S. 8a), the Commission rejected appellants' contentions, two commissioners separately concurring and one dissenting. The district court unanimously sustained the Commission.

The district court held: (1) that nothing in the Interstate Commerce Act prevents a railroad from holding out and publishing rates for both a complete door-to-door service and for a lesser service at a lesser rate (J.S. 8a, 10a–11a); (2) that a schedule of allowances is therefore unnecessary when the shipper accepts the carrier's lesser service at the lesser rate (J.S. 11a); and (3) that the plans are open to all shippers equally and are not made unlawful merely by the motor carrier's unfounded supposition that the railroads may engage in criminal practices (J.S. 12a).[4]

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[3] Appellants also argue that it violates Section 418 of the Act, 49 U.S.C. 1018, for freight forwarders to furnish trailers and flatcars under Plans III and IV. It has been specifically held, however, that freight forwarders may utilize Plan III without violating Section 418 (*Eastern Express, Inc.* v. *United States*, 198 F. Supp. 256 (S.D. Ind.), affirmed, 369 U.S. 37); and both the Commission and the district court correctly stated that this holding is similarly applicable to the forwarder's use of Plan IV (J.S. 15a–17a, 76a). Moreover, even assuming *arguendo* that freight forwarders have improperly utilized Plans III and IV, this would not affect the legality of these plans (J.S. 88a).

[4] Appellants also argued that the rates under Plans III and IV violate the requirement that rates reflect just and reasonable classifications of property, and are so unreasonably low as to

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. It involves only the Commission's refusal—based upon well-settled principles—to hold Plans III and IV illegal because they offer less than a complete service or because some railroads offering the plans *might* illegally provide services or facilities not held out in their tariffs.

1. Relying upon Section 1(4) of the Interstate Commerce Act, 49 U.S.C. 1(4), which requires railroads "to provide and furnish transportation upon reasonable request therefor," appellants argue that Plans III and IV are unlawful in failing to provide all the services and facilities necessary to move goods from the consignor's door to that of the consignee. The district court correctly disposed of that contention by noting that a complete service is offered under Plan II, which is unaffected by the availability of a partial service at a lower rate (J.S. 8a). The statute requires the railroad to provide the full range of services and facilities only "upon reasonable request therefor"; in the case of a shipper who elects Plan III or Plan IV, no such request is made.[5]

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constitute a destructive trade practice. The former argument was abandoned on appeal to the three-judge district court (J.S. 5a), and the latter has apparently been abandoned in this Court.

[5] It was early settled that shippers may provide services in the shipment of goods by rail (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U.S. 199; *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, 225) so long as there is "an increase in the rate where the loading is done in whole or in part by the carrier." *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232

Appellants do not attack the partial service offered by the railroads under Plan I, but only those held out under Plans III and IV. They complain only when the railroad deals directly with the shipper, not when it deals with the shipper through appellants. Yet, the transportation service performed by a railroad under Plan III is for all practical purposes identical to that performed under Plan I (J.S. 42a). Appellants would interpret the Act to permit railroads to offer a partial piggy-back service only when motor carriers serve as intermediaries.

2. In the alternative, appellants argue that shippers may furnish part of the transportation facilities only if they are compensated in accordance with allowances published by the carrier (J.S. 9–10, 23) pursuant to Section 15(13) of the Act, 49 U.S.C. 15(13).* That contention is groundless.

As both the Commission and the district court noted (J.S. 10a–12a; 77a–80a), Section 15(13) is inapplicable to Plans III and IV because the tariff rates thereunder are based upon the premise that the carrier will not undertake responsibility for the loaded

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U.S. 199, 217. This Court has held, therefore, that a railroad may make a charge for line-haul service and at the same time publish a consolidated charge for the line-haul and an accessorial service. *Interstate Commerce Commission* v. *Detroit &c. Ry. Co.*, 167 U.S. 633 (line-haul plus pickup and delivery); *United States* v. *Interstate Commerce Commission*, 352 U.S. 158, 162–163 (line-haul plus wharfage and handling).

*That section provides in pertinent part:

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable * * *."

trailer or flatcar until after it is received for transportation. And the Act forbids a carrier to make an allowance to a shipper unless the service provided by the shipper is offered by the carrier under the applicable tariff. *United States* v. *Interstate Commerce Commission*, 352 U.S. 158, 172; *United States* v. *Wabash R. Co.*, 321 U.S. 403, 410, 412–413.

The provisions of the Interstate Commerce Act become applicable to a shipment only when "merchandise has been placed in the possession of a carrier." *Pennsylvania R. Co.* v. *Ohio Public Utilities Commission*, 298 U.S. 170, 175. Consequently, a carrier's tariff rates may be applied to a shipment only when the merchandise has been brought within the carrier's custody and control. *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130, 134 (C.A. 4). Any shipper dealing with a rail carrier offering TOFC service can, upon reasonable request, obtain a service under which the carrier receives, and thereby becomes responsible for, the freight at the shipper's dock or place of business (Plan II). Many shippers, however, prefer the lower rates offered by Plans III and IV, under which the carrier's custody, and hence responsibility, does not begin until the lading is delivered to it at trackside (J.S. 10a–11a). "[O]bviously," as the Commission held, "[no allowance] can be made to the shipper for performing a service the avoidance of which is the consideration for the lower rate" (J.S. 78a).

3. Appellants argue that Plans III and IV are inherently discriminatory, and thus illegal *per se*, because some rail carriers may succumb to the "in-

centive" of charging Plans III or IV rates, while supplying services in excess of those held out in the tariffs for these plans. But with any tariff there exists a possibility that a carrier will refuse to abide by its provisions and will engage in unlawful practices. If a carrier furnishes service which it does not hold itself out to perform under applicable tariffs, it may be prosecuted under the Elkins Act, 49 U.S.C. 41–43. Here, however, the record contains no evidence of discrimination, preference, or prejudice, and the plans on their face certainly do not suggest any such unlawfulness (J.S. 12a–13a, 84a–85a). And while appellants purport to defend the shippers from discriminatory rates and practices, the shippers themselves oppose appellants' position and support the decision of the Commission (J.S. 8a–9a). The Commission was clearly correct in refusing to find that Plans III and IV are unlawful simply on the basis of conjectures that the railroads may engage in criminal conduct outside their tariffs (J.S. 85a).[7]

[7] Moreover, as this Court observed in a similar context, "(t)he whole situation is subject to the power of the Commission * * * ." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 509. Recently, for example, in *Substituted Service-Charges and Practices of For Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 415, regulations were adopted which require the railroads to publish "all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service * * * and other special services or practices * * *."

CONCLUSION

Since this appeal presents no issue warranting plenary consideration, the judgment of the court below should be affirmed.

Respectfully submitted.

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